Fair Up or Down Vote

May 9, 2005

Noteworthy
"I have a responsibility as a United States Senator to advise and consent on judicial nominations, and that has been denied me and the people of Virginia and the people across this country." **Senator Allen**, Fox News, "Fox News Sunday," 5/8/05

"The actions of our colleagues on the other side amount to changing that 214-year traditional history of this Senate … There is an easier solution to the impasse: Democrats can stop playing their obstruction game and let President Bush's judicial nominees receive what they are entitled to: an up-or-down vote on the floor of the world's greatest deliberative body." **Senator Hatch,** Terence Samuel, "The Nuclear Option," *U.S. News & World Report*, 5/16/05

"Now, the other part of this, which I also believe strongly, is that presidents deserve votes on their nominees." **Senator Hagel**, John Heilprin, "Hagel Hopes For Compromise On Filibusters," *The Associated Press*, 5/9/05

- Filibusters and Misleading Phrases, by Gary Andres, *Washington Times*, May 9, 2005
- Texas' Justice Owen deserves a vote in the Senate, by Senator John Cornyn, *Dallas News*, Sunday, May 8, 2005
- 'Nuclear' Isn't the Only Option, By CHARLES W. PICKERING SR., *Wall Street Journal*, May 9, 2005

Filibusters and misleading phrases
Gary Andres,

Washington Times,
May 9, 2005

With the battle over judges possibly reaching an apex in the Senate this month, both sides claim strong public support for seemingly contradictory positions. Pundits and politicians alike are making unqualified statements based on data that deserve qualification at best -- or maybe should be ignored altogether. Is this just another example of Washington doublespeak? Not really. But it does highlight the critical role of question-wording in eliciting public opinion on complicated policy issues. Excavating just a little below the surface reveals different phraseology which produces stark differences in poll results. Focusing carefully on the language in these surveys helps untangle the contradictory conclusions.

For example, National Public Radio's Juan Williams said on this past week's "Fox News Sunday" regarding judicial confirmations, "I don't know what you're looking at, but the polls are pretty clear that Republicans are losing this fight in the realm of public opinion." Perhaps Mr. Williams missed a recent Voter/Consumer Research (VCR) poll (April 17-19, 801 registered voters), which asked "Do you agree or disagree with the following: Even if they disagree with a judge, Senate Democrats should at least allow the President's nominations to be voted on."Eighty-onepercent agreed, while only 18 percent disagreed.

If that's losing, those numbers take the sting out of defeat. Mr. Williams was referencing an ABC News/Washington Post poll (April 21-24, 2005, 1007 adults) that reported only 26 percent of adults said they would "support changing Senate rules to make it easier for the Republicans to confirm Bush's judicial nominees." A whopping 66 percent said they would "oppose" such an effort.

That question, however, is a bit over the top in terms of its "loaded" words. "Changing the Senate rules" and "making it easier for the Republicans to confirm Bush's judicial nominees" contain more politically-charged verbal baggage than an overstuffed tote packed for a year-long filibuster. When the question about changing procedure is asked differently, the results nearly flip-flop (see charts below). When VCR asked: "And if you could do only one of the following two on this issue, what would you do: Change procedures to make sure the full Senate gets to vote, up or down, on every judge the President nominates or make sure Senate procedures stay in place that allow the minority party to block any judge whose views they disagree with?," 64 percent supported changing the procedures, while only 28 percent supported maintaining them.

The VCR question, while not perfect, is a fairer way to frame the issue. It keeps the party labels out of the debate. It also asks about changing "procedures," not "rules," which is a more accurate characterization of what Senate Republicans contemplate. In the end, citizens will have to carefully evaluate the statements about polls used by politicians and pundits. Considering how some have used public-opinion research in this debate, a cautious eye is in order. But Republican claims that Americans support an up or down vote on judicial nominees appear on strong footing.

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John Cornyn: Texas' Justice Owen deserves a vote in the Senate

Sunday, May 8, 2005
Dallas News

Four years ago today, President Bush nominated Texas Supreme Court Justice Priscilla Owen to serve on the federal court of appeals.

At the time, as Priscilla and several other nominees stood with the president in the White House, none of her friends and former colleagues could imagine that four years later she would still be waiting for an up-or-down vote in the U.S. Senate.

I know Priscilla personally; we served together on the Texas Supreme Court. During those three years, I had the privilege of working closely with her, observing, on a daily basis, precisely how she works, how she thinks, how she addresses the challenge in the job of judging in literally hundreds, if not thousands, of cases.

And during those three years, I spoke with Justice Owen on countless occasions and debated with her and, yes, even disagreed with her on how to interpret statutes and how to try our very best to uphold the oath that we take when we assume the robe as a judge. That is, to read statutes faithfully and carefully and to decide cases based on what the law says and not on how we personally would like to see the case come out.

I watched her as she took careful notes and literally pulled down the law books herself and studied them closely. And I saw how hard she worked to faithfully interpret and apply the law that the Texas Legislature has written and the precedents that have been handed down by higher courts, or previously by our own court.

But not once did I see her pursue a political or personal agenda at the expense of adherence to the rule of law. On the contrary, I can testify that Justice Owen works hard to follow the law and enforce the will of the Legislature.

Throughout her life, she has excelled in virtually everything she has done. She was a law review editor, a top graduate from Baylor Law School at the remarkable age of 23 and the top scorer on the Texas bar exam. She entered the legal profession at a time when relatively few women did, and after a distinguished record in private practice, she reached the pinnacle of the Texas bar -- a seat on the Texas Supreme Court.

She was supported by a larger percentage of Texans than any of her colleagues during her last election, after enjoying the endorsement of every major Texas newspaper.

So it is no surprise that the American Bar Association gave her its highest possible rating -- unanimously. And it is similarly unsurprising that she enjoys the enthusiastic support of a bipartisan majority of my fellow senators.

Yet a partisan minority of senators now insists that Justice Owen may not be confirmed without the support of a supermajority of 60 senators -- an unprecedented act, by their own admission.

And that's precisely the problem with the opposition to Justice Owen: It's clear that its argument is so weak that a breach in Senate tradition is the only way it can prevent her confirmation.

It's unfortunate that the judicial confirmation process has become so emotional and politically divisive. Our system is broken, and we need a

fresh start. At a minimum, surely all Americans of good faith agree that the rules must be the same, regardless of whether the president is Republican or Democrat.

Since our nation's founding, the Senate tradition and constitutional rule for confirming judges has been by majority vote. We should uphold and restore that tradition -- and we should give Justice Owen an up-or-down vote.

John Cornyn is a U.S. senator from Texas and a member of the Senate Judiciary Committee. Readers may contact him through Cornyn.Senate.gov.

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'Nuclear' Isn't the Only Option

By CHARLES W. PICKERING SR.

May 9, 2005

If the partisan, bitter and mean-spirited battle over judicial confirmation continues to escalate, it threatens not only the quality and independence of the judiciary, but its diversity as well. The confirmation process is broken; it badly needs to be fixed. Each side thinks the other escalated the fight. But the opposition to the Bush nominees is unprecedented.

Let me discuss four possible solutions. First is the ballot box. Those opposing the Bush nominees lost at the ballot box for the election of senators in 2002, in 2004 and in the presidential election in 2004. Part of the reason was filibustering judges. And they will continue to pay a price as long as they are controlled by narrow, extreme special-interest groups.

The second possible solution is the Constitutional solution, referred to as the "nuclear option." But this is a misnomer. Confirming judges by a majority vote is simply following the Constitution. The Constitutional option may be the only appropriate short-term solution if there is another filibuster of a judicial nominee. Stopping the filibuster of judges will not reverse Senate precedent because judges had never been denied confirmation because of a filibuster prior to the past four years. The filibuster as to legislative matters will not be affected.

Any solution that is going to solve this problem long term must be fair and reasonable to both sides and both sides must have meaningful input. Consequently, the third solution that I suggest, and one that I hope Congress will implement, is to pass a statute that could be designated as "The Judicial Confirmation Improvements Act." Such an act should provide that within a certain period of time after a judicial nomination is received a hearing will be held, within a specified time a nominee will be voted out of committee, with or without a favorable recommendation, and within a certain period of time the full Senate will debate and confirm or reject a nominee by majority vote. This will be fair to presidents from either party. Nominees will know that within a reasonable period of time they will be confirmed or not confirmed, and they can get on with life.

Nevertheless, while passage of a statute clearly establishing the procedure and timetable for confirming judges will greatly improve the process, it will continue to be controversial as long as members of the

Supreme Court interpret the Constitution according to their "independent judgment" as to society's "evolving standards of decency." So, the ultimate solution to eliminating the controversy over confirming federal judges will be to adopt a constitutional amendment providing that in the future -- I'm not talking about the past, but in the future -- the sole method for changing the meaning of the Constitution will be by the amendment process. Between 1798 and 1971, the Constitution was amended 16 times. Between 1933 and 1971, our Constitution was amended seven times, an average of one amendment every five to six years. These were substantive amendments dealing with hot-button issues such as abolishing slavery, eliminating the poll tax and granting the right to vote to women and 18-year-olds. But no constitutional amendment has been initiated in the past 34 years. The amendment process worked for 150 years and it can work again if we try it.

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The statutory solution and passing a Constitutional amendment are win-win solutions for both political parties, for prospective nominees, for future presidents and for the Senate -- but above all for the American people. Passing such a statute and such an amendment will not be easy. But if our Founders could find common ground to adopt our Constitution with all of the differences of opinion and the competing theories of government that abounded in the 1780s, surely our leaders of today can come up with a solution.

Here's hoping that wisdom, reason, fairness and cooler heads will prevail, that statesmen will emerge, and find a way out of the present quagmire for the sake of the judiciary, our children and our grandchildren, and the rights of all Americans. We must never give up on our effort to maintain the rule of law, in its truest sense.

Mr. Pickering , formerly a U.S. District Court judge in Mississippi, served on the Fifth Circuit Court of Appeals in 2004, under recess appointment by President Bush. He is now senior counsel at Baker Donelson Bearman Caldwell & Berkowitz.